No. 80-1582

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

*Petitioner*

vs.

JEFFREY R. MACDONALD,

*Respondent*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## BRIEF FOR RESPONDENT

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## BRIEF FOR RESPONDENT

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## OPINIONS BELOW

The pretrial opinion of the court of appeals (Op.App. 1A-35A) is reported at 531 F.2d 196. Its post-trial opinion

(Pet.App. 1a-27a) is reported at 632 F.2d 258. The opinion and order on denial of rehearing (Pet.App. 29a-49a) is reported at 635 F.2d 1115.[1]

## *STATEMENT*

Although the legal issues before this Court relate to the denial of speedy trial, it is necessary to provide a synopsis of the background facts in order to assess the prejudice attributable to the unreasonable delay that the court below charged to the government. We first set forth a summary of facts relating to the crime; secondly, the procedural history of the case; thirdly, a summary of the findings and conclusions of the court below.

### *Factual Background*

In February 1970, Dr. Jeffrey R. MacDonald was a 26-year-old captain serving as a medical officer assigned to a Green Beret unit at Fort Bragg, North Carolina. He lived with his wife, Colette, who was pregnant at the time, and his two daughters, Kimberly (aged 5) and Kristen (aged 2) in a small apartment on the Army base.

In the early morning hours of February 17, Mrs. MacDonald and the two children were murdered. Each had suffered multiple stab wounds and beatings with a club. Dr. MacDonald himself had suffered more

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[1]The questions presented and the facts relating to the jurisdiction of this Court are set forth in the government's brief.

Respondent's brief uses the following designations. "Pet.App." refers to the appendix to the government's petition for certiorari; "Op.App." to the appendix to respondent's brief in opposition; "J.A." to the printed joint appendix; "Tr." to unprinted portions of the trial transcript; "C.A.App." to the joint appendix before the court of appeals. All of the above material is before this Court.

than seventeen wounds, including a life-threatening stab wound of the chest which caused a partial lung collapse, puntures on his arms and stomach, and bruises to the head.

Dr. MacDonald, the only witness to testify to the circumstances of the attack, gave the following account. (*See* Tr. 6560-6615.)

He spent the evening of February 16th at home with his two children while Colette attended an evening class at a local college. He put the two children to bed, Kristen at about 7:15, Kimberly at about 9:00. Colette returned home at about 9:40 and retired at about midnight. Dr. MacDonald watched television in the living room until about 1:00 a.m. When he went to the master bedroom, he found that Kristen had gotten into bed with her mother. He carried Kristen to her own room and then discovered, upon returning to the master bedroom, that she had wet his side of the bed. He thereupon secured an afghan and went to the living room to sleep on the couch.

His next recollection, after falling asleep, was that he heard Colette screaming. As he started to rise, he saw several people at the foot of the couch. He made out that there were four persons in the room — one black male, two white males and one white female. He was promptly attacked, and he struggled with his assailants. He heard the woman say, "Acid is groovy; kill the pigs." During the struggle his hands became bound up in his pajama top. At some point in the brief affray, he felt a sharp pain in his right chest. Also, he fleetingly observed that the woman had blond hair, that she was wearing a white floppy hat and boots, and that there was a flickering light on her face as if she were holding a candle.

The next thing he remembers, he was lying on the floor and the house was quiet. He got up and went to the master bedroom. Colette was on the floor. Blood was pro-

fuse. He removed the pajama top, which was still on his wrists, and pulled a knife from Colette's chest. He attempted mouth-to-mouth resuscitation, but found that air was coming from the wounds in her chest. He checked Colette's pulse but could detect no sign of life.

Dr. MacDonald then went, in turn, to the children's rooms. They, too, were covered with blood and proved unresponsive to attempts at resuscitation.

Although the exact sequence of events has never been clear to him, at some point he went into the bathroom. He returned to Colette. He may have again attempted artifical respiration. At another point, he reached for his pajama top and placed it in on Colette's chest and placed some other item on her as well. He does not know why he tried to cover her, only that he did.

He picked up the phone in the master bedroom and dialed the operator to call for help. When the operator insisted on knowing whether he was calling from on-Post or off-Post, he dropped the phone. Noticing that the back door (which opens off a utility room next to the master bedroom) was ajar, he went to that door. He looked out, did not see anything or anyone, and returned to check once again his wife and children.

The next thing he recalls is being on the phone in the kitchen. He picked up the phone, and, without having dialed, heard a female voice ask if he was Captain MacDonald. He said he was, that people had been stabbed and were dying, and that help was needed. Then a sergeant came on the phone and Dr. MacDonald again said that people were dying. The next thing he knew, there were people standing over him. He was lying next to

Colette in the master bedroom and a military policeman was giving him mouth-to-mouth resuscitation.[2]

When he revived, Dr. MacDonald gave the military police the following description of the four intruders: one black male wearing an Army field jacket with sergeant stripes on the sleeve, two white males, and a blond female wearing a floppy hat, boots and a short skirt, and possibly carrying a candle (Tr.1503-1505).[3]

The day after the murders, a Fayetteville police officer, Beasley, approached Helena Stoeckley, a young woman who was well known to him because he had regularly used her as a drug informer. His reason was that "you and the people you are with fit the description that

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[2]Dr. MacDonald was found unconscious when the military police arrived on the scene (Tr. 1406).

[3]Sergeant Mica, one of the military police who answered the call from Dr. MacDonald, had observed a woman with a floppy hat on the corner of South Lucas and Honeycutt Road as he drove to the MacDonald residence. This was shortly before 4:00 a.m. He would have investigated further but for the fact that he was on an emergency call (Tr. 1450–52).

It is clear that Helena Stoeckley (see discussion in text immediately following) was abroad at that hour. She was observed by a neighbor (one Posey) as she alighted from a car in front of her apartment at about 4:30 a.m. The car was a blue Mustang that had been there before, and there were at least two other people in the car (Tr. 5990–92; J.A. 155–156).

Stoeckley herself confirmed that she came home at about 4:30 or 5:00 a.m. on February 17th. She testified that she arrived in a blue car in the company of three soldiers, but did not know their names. She also said she was unable to recall where she had been between midnight, when she remembered leaving her place, and 4:30 when she returned (J.A. 50, 53-54).

was given out" (Tr. 5741).[4] Stoeckley responded, "In my mind, it seems that I saw this thing happen," adding she had been "heavy on mescaline" (Tr. 5742). Thereafter, Stoeckley, over the course of time, made out-of-court admissions to six other persons implicating herself in the MacDonald murders. We deal more fully in the Argument, *infra*, with the Stoeckley story — who she was, the various admissions against penal interest that she made, and the circumstances that tend to corroborate them. At this juncture, we note that on the witness stand in 1979 she stated that she no longer remembered where she had been and what had occurred in the early morning of February 17, 1970 (J.A. 51-52, 54-55). She also stated that she could not recall the admissions attributed to her by the seven auditors who heard her admissions against penal interest. *Id.* The district court, however, did not permit the jury to hear any of Stoeckley's out-of-court admissions (heard by the court on *voir dire* and reproduced at J.A. 121-169), ruling against respondent's contentions that they were admissible both as admissions against penal interest and for purposes of impeaching Stoeckley's denial of recollection.

The government, for its part, disclaimed any ability to show that Dr. MacDonald had motive to commit the crimes (Tr. 7293-94), relying solely upon the discovery

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[4]Beasley knew that Stoeckley frequently wore a blond wig and a floppy hat during the period in question. He also knew that she associated with a black male who invariably wore a fatigue jacket with "E-6 stripes" (Tr. 5832–33). Stoeckley's next door neighbor, Posey, testified that Stoeckley's blond wig, white boots and floppy hat were "her trademark" in the "hippie" group in which she traveled (Tr. 5986–87). Stoeckley testified that she burned her blond wig on about February 19 or 20, 1970, "because it connected me with the murder" (J.A. 77–78), and that she threw her white boots in a trash can because the "heel came off one of them" (J.A. 78).

and analysis of various items of physical evidence at the scene. Its theory was that various aspects of respondent's story were inconsistent with the physical evidence, and that Dr. MacDonald had inflicted his own wounds and staged evidence of an intrusion of outsiders as a cover for his own crimes.[5] Ultimately, then, the case came down to an evidentiary clash between Dr. MacDonald's account and the government's hypothetical reconstruction of the crime.[6]

*Procedural History*

Promptly after the crime occurred, an investigation was undertaken by the Army's Criminal Investigation Division (CID), the FBI and the Fayetteville (N.C.) police department (Op.App. 4A-5A). A team of experts from the CID laboratory examined the crime scene for a week and collected the items of physical evidence which thereafter formed the basis of the government's case in

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[5]In its first opinion in this case the court of appeals observed (Op.App.21A) that the government's case depended on a "detailed reconstruction of the murder scene." It explained (*id.*) that the "position of a flower pot, the way MacDonald's pajama top was folded, the condition of the sheets in the bedroom, are but examples of the many questions about physical evidence that the government's case turns on." In his appeal subsequent to the trial, Dr. MacDonald challenged the admissibility of certain demonstrations attempted by the government's investigators on the ground that they were seriously flawed. In light of its disposition of the case on Sixth Amendment grounds, the court below refrained from disposing of these and other issues.

[6]This, of course, brings sharply into focus respondent's claim, discussed below in relation to respondent's constitutional arguments, that the defense was critically prejudiced by being deprived of the opportunity to bring to the jury the words of the one known living witness, other than Dr. MacDonald, who admitted to presence at the scene of the crime.

both the military and civilian criminal proceedings. The laboratory analysis of the evidence was completed within a matter of weeks. On April 6, 1970, Dr. MacDonald was informed that he was a suspect and was restricted to quarters. On May 1, 1970, he was formally charged with the murders, placed under arrest, and confined under armed guard to his quarters (Op.App.4A). Shortly thereafter, an Investigating Officer, Colonel Warren V. Rock, was appointed, pursuant to Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832, to examine the charges against Dr. MacDonald. The evidence presented by the government at the military justice proceedings was wholly circumstantial, consisting of physical artifacts found at the crime scene. Fifty-six witnesses, including respondent, were heard by the Investigating Officer (Op.App.5A). At the conclusion of the proceedings in October 1970, Colonel Rock prepared a 90-page report finding: (1) that the charges against Dr. MacDonald were "not true," and (2) that there was sufficient evidence against a woman named Helena Stoeckley to require an investigation by civilian law enforcement agencies of her involvement in the murders and the assault on Dr. MacDonald (Op.App.5A).

The charges against Dr. MacDonald were thereupon dismissed by the Army. Shortly thereafter, he was honorably discharged.[7] In January 1971, however, the Justice Department requested that the CID reopen the matter. The ensuing investigation by the CID was completed in December 1971, eleven months later. It had interviewed numerous witnesses and re-examined the physical evidence in crime laboratories (Op.App.6A). No new physical evidence was uncovered (Op.App.6A, 17A-

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[7]Subsequently he moved to Southern California where he lives today, working as Director of Emergency Medicine at a major hospital.

18A). The CID then took six more months to assemble its findings and write a report, which was submitted to the Justice Department in June 1972 (Op.App.6A).

From June 1972 until August 1974, when a grand jury investigation was begun, there was no significant investigative activity in the case (Op.App.17A-18A, Pet.App.4a-5a), although Dr. MacDonald, in person and through letters from his attorneys, urged that the Justice Department complete its investigation and offered his full cooperation. Attorneys in the Justice Department debated whether to prosecute Dr. MacDonald, but no action was taken for two years, until 1974, when a new Justice Department attorney was assigned to the case. He began to present evidence to the grand jury (before whom respondent testified) in August 1974 (Op.App.6A, Pet.App.8a).

On January 24, 1975, an indictment was returned[8] and on January 25, 1975 respondent was again arrested. He promptly filed motions to dismiss the indictment on speedy trial and double jeopardy grounds. The district court denied those motions and the court of appeals stayed the trial pending hearing of an appeal (Op.App.1A).

In January 1976, the court of appeals reversed the district court's order denying respondent's speedy trial motion. 531 F.2d 196 (1976). This Court granted the government's petition for certiorari and reversed the court

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[8]In light of the decision in Furman v. Georgia, 408 U.S. 238 (1972), it appeared clear that a death sentence could no longer be imposed under 18 U.S.C. § 1111 (first degree murder). It was accordingly questionable whether the limitations provision of 18 U.S.C. § 3281 (no limitation for "any offense punishable by death") was applicable. If not applicable, the governing period was five years. 18 U.S.C. § 3282 (offenses "not capital"). The indictment was returned a few weeks before the expiration of that period.

of appeals on the ground that the district court's order was not appealable in advance of final judgment in the main case. 435 U.S. 850 (1978).[9] On remand, the court of appeals ruled that a trial on the federal indictment would not violate the Double Jeopardy Clause (585 F.2d 1211 (1978)) and returned the case to the district court. Following a jury trial in the summer of 1979, respondent was convicted. The district court denied a motion to vacate the conviction and dismiss the indictment on speedy trial grounds. Respondent appealed, renewing his speedy trial claim and raising additional issues.

On this second appeal to the Fourth Circuit, the court below (a different panel from that which heard the first appeal) again sustained respondent's claim of denial of the right to a speedy trial. 632 F.2d 258 (1980). A divided court of appeals denied the government's application for rehearing en banc. 635 F.2d 1115 (1980). On May 26, 1981, this Court granted certiorari.

*Findings and Conclusions of the Court of Appeals*

The reasoning of the decision below, reflected in the opinions of both panels, is that the Sixth Amendment right to speedy trial was triggered by the arrest and formal charging of the respondent by the military on May 1, 1970; that, although that charge was dropped by the Army in October 1970, investigations directed at Dr. MacDonald were soon resumed by the Army CID, at the request of the Justice Department, in January 1971; that thereafter Dr. MacDonald continued to be subject to extensive and notorious publicity and investigation, to public obloquy, to the stress and anxiety of threatened pros-

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[9]This Court explicitly noted that it was not reaching the merits of the claim. 435 U.S. at 863, n.9.

ecution, and to the need to retain the services of counsel in his defense; and that, in these circumstances, the government was chargeable with periods of inexcusable delay, though not with any period of delay reasonably related to the pursuit of legitimate prosecutorial objectives.[10]

Having concluded that the speedy trial provision of the Sixth Amendment was activated in May of 1970 and that it continued to be operative, the court of appeals examined the question of violation from the standpoint of the four factors set forth by this Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

*Length of Delay*. From the date of the crime (February 1970) until the grand jury proceedings were initiated (August 1974), there was an interval of more than four and one-half years. Although the court of appeals considered the provision for speedy trial activated by the action of the military in arresting and charging Dr. MacDonald on May 1, 1970,[11] it regarded as most critical the period from June 1972 until August 1974 (Op.App.17A;

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[10]The court below found, *inter alia*, that the termination of the Article 32 proceeding did not "dispel the effects of the government's initial accusation" (Op.App.13A); that the "government's efforts to convict" Dr. MacDonald persisted (Op.App.14A); that respondent was subjected to "extremely intrusive" publicity and to great personal pressures and anxiety (Pet.App.6a,16a), "demonstrated by the expense and concern he expended in attempting to have the charges resolved" (Pet.App.16a).

[11]"The military arrest was equivalent to civilian arrest" and respondent was held "to answer a criminal charge" (Pet.App.4a). The court below further stated (*id.*) that the Sixth Amendment "secures an accused's right to a speedy trial against oppressive conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution."

Pet.App.4a-5a). As noted above, the military charges were dismissed in October 1970. In January 1971, the Department of Justice requested the Army CID to conduct a reinvestigation. The CID took eleven months, until December 1971, to do so, and an additional six months, until June 1972, to submit its report. From that point until the start of the grand jury proceedings in August 1974, there was a hiatus of more than two years.[12]

*Reason for Delay.* "The Justice Department was in possession of all the evidence from June 1972" (Pet.App.5a). The delay that followed resulted from

> . . . either a disagreement between two groups in the Justice Department as to whether the case should be prosecuted, or just simple government bureaucracy (the contention of the involved Assistant U.S. Attorney) [Pet.App.8a].[13]

"[T]he government's calloused and lackadaisical attitude . . . was solely responsible for at least the last two years

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[12]A chronology is set forth at Op.App.36A-37A.

[13]Referring to this same period of delay (one which the first panel of the court of appeals had likewise found unreasonable Op.App.18A), Assistant to the Solicitor General Kenneth S. Geller, stated to this Court when the case was previously here (Transcript of oral argument before this Court, January 9, 1978):

> Now during that two or two and a half years, there were two prevailing views within the Government. One group of attorneys thought that the case should be brought to a Grand Jury immediately, with a view toward bringing charges against Respondent. Another group of attorneys, while also convinced that Respondent was guilty, frankly, couldn't believe that we could convince the jury of that.

of delay" (Pet.App.16a). This was an "irresponsible administration of justice." *Id.*[14]

*Defendant's Assertion of His Right.* "There is no question but that MacDonald vigorously pursued his right to a speedy disposition of the charges against him. He gave statements to the CID while still in the military and testified under cross-examination at the military hearing. He waived immunity and testified before the grand jury when it was finally convened, and consistently, after his discharge, contacted the Justice Department in an attempt to expedite the resolution of his case" (Pet.App.8a).[15]

*Prejudice to the Defendant.* The findings of prejudice have two aspects: those that relate to the burdens imposed upon respondent by virtue of the government's delay in proceeding with the case and those that affect the fairness of the trial itself. With respect to the first, the court below found that during the five-year pre-indictment period Dr. MacDonald labored "under a cloud of suspicion" (Pet.App.16a); that "extremely intrusive publicity" interfered with his life and affairs" *(id.)*; that, "from a practical standpoint", the effects of the government's "initial accusation" continued unabated despite the Army's dismissal of its charge since "the government's efforts to convict" openly persisted (Op.App.13A-14A); and that "the personal pressure and anxiety" gen-

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[14]The first panel (with whose findings the second panel stated its full agreement, Pet.App.4a,7a,49a) had stated that the delay between mid-1972 until the return of the indictment in January 1975 must be attributed to the government's "indifference, negligence or ineptitude" (Op.App.19A).

[15]Two of the letters written by Dr. MacDonald's trial attorneys to the Justice Department in the course of his efforts to secure expedition are quoted at Op.App.6A-7A, notes 5 and 6.

erated by the threatened prosecution are "demonstrated by the expense and concern [Dr. MacDonald] expended in attempting to have the charges resolved" (Pet.App.16a). Addressing itself to the trial itself, the court of appeals observed that there are peculiar hazards for a defendant in dealing with a hypothetical reconstruction of a crime and in combatting "an array of technical evidence. The technical witnesses frequently are relying on scientific speculation and trial and error" (Pet.App.16a, n.7). The difficulty of examining the basis of their claims and observations is aggravated when memories have faded and the witnesses rely on statements or writings made years before. "The risk to MacDonald," the court stated (Pet.App.10a), "was simply too great that, in preparations *prior to the testifying* of each witness, the prosecutors helped fill lacunae of recollection, and assured consistency of support for their theory of the case . . ." *Id.* (italics in original) The length of the intervening period "rendered it virtually impossible for MacDonald to probe the recollections of each witness . . ." *Id.*

Dealing with the claim of witness Helena Stoeckley that she did not recall her whereabouts or activities during the critical hours of February 17, 1970, the court of appeals found that the failure of Stoeckley to verify "MacDonald's own version of a Manson-like intrusion . . . may well have been disastrous to the defense" (Pet.App.11a-12a). "Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great" (Pet. App.12a). The opinion continued (*id.*):

> The possible reasons why Stoeckley did not testify are several. But the reason she asserted under oath was failure of memory. The government's inexcusable delay of over two years' duration cannot be eliminated as a potential — indeed a probable — cause of memory lapse.

Finally, the court below pointed out that the defense was frustrated in its attempt to introduce Stoeckley's numerous admissions against penal interest (Pet.App.12a-13a, at n.6):

> Efforts of MacDonald to supply the deficiency of Stoeckley's memory by introducing hearsay testimony from those she had told stories which placed her on the scene on the night of the crimes were thwarted by government objections sustained by the district judge on the basis of Fed. Rules of Evid. 403, 804(b)(3). We have no occasion to question the correctness of the judge's evidentiary rulings. With hindsight, however, the government prosecutors may rue having prevented curative action for one potentially devastating prejudicial consequence of the government's unwarranted delay and concomitant failure to move ahead in a fashion to insure to MacDonald a speedy trial.[16]

## *SUMMARY OF ARGUMENT*

### I.

The court of appeals rejected the government's contention that a hiatus between the dismissal of a criminal charge and its reinstitution would "never count" for purposes of applying the Sixth Amendment's guarantee of a speedy trial. Its conclusion that a particularized period of delay did count in the instant case rests upon findings that the initial charge was accompanied by extraordinary publicity; that the dismissal of that charge was followed by open and active reinvestigation directed at Dr. MacDonald; that the effects of the public accusation were not dispelled, but continued to bear heavily upon

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[16]We advert to the substance of these admissions, heard by the district judge on *voir dire*, in Point II of the Argument *infra*.

the accused; that, after completing its lengthy reinvestigation, the government took an additional period of more than two years before deciding to proceed with the case; that "at least the last two years of delay" was inexcusable and irresponsible; and that the government's conduct, in addition to imposing severe burdens during the pretrial period, prejudiced the defense at the trial proper. That ruling is protective of interests long recognized by this Court as lying at the core of the speedy trial guarantee: "to minimize anxiety and concern accompanying public accusation" and "to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell,* 383 U.S. 116, 120 (1966). It is also fully consistent with *United States v. Marion,* 404 U.S. 307 (1971). *Marion*'s holding that delay preceding a public accusation is challengeable only under the due process clause does not warrant a conclusion that the prosecution can avoid the demands of the Sixth Amendment, even though it has made a public accusation, by the expedient of dismissing a charge and reinstating it at leisure.

The ruling below in no way inhibits the government's pursuit of legitimate prosecutorial objectives. This is evidenced by the court's care in excluding from consideration all of the time consumed by the government's lengthy reinvestigation. To hold, however, that the government, having set a prosecution in train, is excused from all requirements of due diligence if it interrupts the formal proceedings, would ignore the protected interest of the affected individual. It would also disserve society's interest in the prompt administration of justice. Indeed, it would invite widespread abuse if the government were allowed "to circumvent the speedy trial requirement by successively dismissing and reinstating a complaint or indictment for the same offense," *United States v. Avalos,* 541 F.2d 1100, 1108-1109, n.13 (5th Cir.1976). This view,

reflected in the opinion below, is widely supported by decisions of other federal courts and of numerous state tribunals.

## II.

Although the court below found it unnecessary, in light of its Sixth Amendment ruling, to decide whether the prejudice caused by the government was also sufficient to make out a violation of due process, its findings and the supporting record show that Dr. MacDonald was in fact denied the elements of a fair trial.

The government's case rested entirely on a hypothetical reconstruction of the crime. Yet, as the court found, there was "almost certain memory erosion" on the part of the government's investigators. This "rendered it virtually impossible" for the defense to probe their recollections and to test the premises and assumptions upon which their "scientific speculation" rested. "The risk to MacDonald was simply too great that, in preparations *prior to the testifying* of each witness, the prosecutors helped fill lacunae of recollection" in order to assure "consistency of support for their theory of the case. . . ."

Equally important was the impact of delay upon the defense's ability to develop its affirmative case. Dr. MacDonald's defense was that the crime was committed by four intruders and that he was the sole survivor of a murderous assault upon his family. His description of the female intruder was sufficient to lead a local police officer to Helena Stoeckley. Stoeckley promptly acknowledged a connection with the crime. Thereafter, she made admissions placing herself on the scene, or otherwise implicating herself, to six other persons (acquaintances, friends and law officers). Numerous facts and circumstances provided corroboration of her admissions. At the trial, however, Stoeckley denied recollection of events

during the critical hours of February 17, 1970, when the crime occurred. The court below found that her failure to verify Dr. MacDonald's account from the witness stand "may well have been disastrous to the defense;" that, had she testified "as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculaby great;" that "the reason she asserted under oath was failure of memory;" and that the government's inexcusable delay was a "probable cause" of the defense's inability to get an account from her when she appeared before the jury.

The consequences of Stoeckley's unavailability as a witness might have been allayed, if not cured, had the jury heard her out-of-court declarations. At the government's urging, however, the trial court excluded the testimony of those who had heard Stoeckley's admissions against penal interest. This ruling was indefensible, both as a matter of interpretation of the Federal Rules of Evidence and under the constitutional standard set forth in *Chambers v. Mississippi,* 410 U.S. 284 (1973). The prosecution thus succeeded in compounding the prejudice initially caused by its delay. The conviction it obtained offends fundamental conceptions of justice.

## *ARGUMENT*

### I.

### THE COURT BELOW CORRECTLY HELD THAT IN THE CIRUMSTANCES OF THIS CASE THE GOVERNMENT'S INEXCUSABLE DELAY IN REINSTITUTING THE CHARGES AGAINST RESPONDENT VIOLATED THE SIXTH AMENDMENT'S GUARANTEE OF A SPEEDY TRIAL

A. The government's contention, twice rejected by the court of appeals, is that the period falling between

the Army's dismissal of the murder charges lodged against Dr. MacDonald in 1970 and the presentation of the same charges to the grand jury in 1974 is immaterial for purposes of applying the Sixth Amendment's guarantee of a speedy trial. Before addressing the legal arguments bearing on this claim, we point out that the ruling below is a circumscribed one, grounded on the particular facts of this case and reflecting the court's awareness that the right to a speedy trial is "necessarily relative" and "depends upon circumstances."[17]

As emphasized by Judge Murnaghan, author of the opinion below, there are few "absolutes . . . in our judicial system." The court did not hold that an interval between dismissal of a charge and reindictment for the same offense is always significant for speedy trial purposes; rather, it avoided "a simplistic rule" that the hiatus would "never count" (Pet.App.49a). We have set forth in the Statement the background and history of the proceedings and the concurrent findings adopted by the court below in 1976 and 1980. We recapitulate briefly the particular circumstances on which the court relied.

Dr. MacDonald was initially charged by the United States Army. He was arrested and held under restraint for six months. Shortly after dismissal of the military charges, the government's efforts to convict him revived. Throughout, he was subjected to "immense publicity" and "continued inquietude because the matter was not put to rest" (Pet.App.49a). Stress, anxiety, public obloquy, financial drain, and interference with respondent's life and affairs were unabated. Respondent cooperated

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[17]The quoted language is from Beavers v. Haubert, 198 U.S. 77, 87 (1905), this Court's first decision involving the constitutional right to a speedy trial. The proposition is one which the Court has consistently followed. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 533 (1972).

with the authorities at every stage and made every effort to secure a prompt resolution of the renewed investigation. Nonetheless, the government pursued a course of protracted and inexcusable delay. In consequence, respondent suffered, in addition to the burdens of living under a heavy cloud of suspicion during the period that he was subjected to threat of renewed prosecution, the liability of prejudice to the conduct of his defense at trial.

B. The government relies heavily on *United States v. Marion*, 404 U.S. 307 (1971), in which the appellees asserted a Sixth Amendment claim on the ground that there was a three-year delay between the time that the authorities obtained the information upon which indictment might have been sought and the time they proceeded to do so. This Court declined "to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation. . . ." 404 U.S. at 321. We have no quarrel with *Marion*'s holding that it takes an official act — arrest or public accusation — to engage the tenets of the Sixth Amendement.[18] While it is sometimes true, and often unavoidable, that suspicion will attach to an individual from the mere fact that a crime has been committed and is under investigation, governmental responsibility assumes a different dimension when the sovereign levels an official charge. That is true as well of other protections founded on the Bill of Rights, such as the Sixth Amendment right to counsel[19]

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[18]*See also*, Dillingham v. United States, 423 U.S. 64 (1975), holding that when arrest precedes formal indictment the date of arrest marks the initiation of prosecution for purposes of applying the speedy trial provision.

[19]*See* Massiah v. United States, 377 U.S. 201 (1964); Kirby v. Illinois, 406 U.S. 682 (1972); Brewer v. Williams, 430 U.S. 387 (1977).

or an individual's Fifth Amendment right to be warned, prior to custodial questioning, that he has a right to remain silent.[20]

In short, it is not critical for present purposes that *Marion* refused to apply the speedy trial provision to the period preceding indictment of those appellees. It is significant that a contrary result would have obtained had they been arrested in advance of indictment. Arrest, the Court stated (404 U.S. at 320), is "a public act" that may carry serious consequences for the individual.

Dr. MacDonald *was* arrested and publicly charged in May 1970 and he remained under restraint until October of that year. The government's reliance on *Marion* thus comes down to the proposition that, although the speedy trial provision was undeniably engaged in May 1970, it was disengaged in October. The holding in *Marion* certainly does not embrace the latter conclusion. The ruling that the public act of accusation starts the clock hardly justifies the inference that the government can stop the clock at will, for however long it chooses, by dropping the formal charge and later reinstating it. In that situation, we submit, it is appropriate to ask, as the court of appeals did, whether the effects of the public accusation were dispelled or whether, by virtue of the government's further course of conduct, they continued unabated for periods that were both unnecessary and unreasonable.

As this Court has stated, the constitutional guarantee of speedy trial "has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: '[1] to prevent undue and oppressive incarceration prior to trial,

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[20]Miranda v. Arizona, 384 U.S. 436 (1966).

[2] to minimize anxiety and concern accompanying public accusation, and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself.' *United States v. Ewell*, 383 U.S. 116, 120." *Smith v Hooey*, 393 U.S. 374, 377-379 (1969). While dismissal puts at least a temporary end to pretrial detention, it does not satisfy the two other protected interests in circumstances where the threat of a revived prosecution remains overhanging.

*Klopfer v. North Carolina*, 386 U.S. 213 (1967), a case which has marked similarities to this one, recognizes the critical importance of those interests. In Klopfer's case, the prosecutor had entered a *nolle prosequi* with the approval of the state court. Under North Carolina practice, this left open the possibility of reinstatement of the indictment at a subsequent term of court. The Supreme Court of North Carolina reasoned that indefinite postponement of the case did not implicate the speedy trial provision because Klopfer, having been discharged from custody, was free to go "whithersoever he will." 386 U.S. at 222. Pointing out that the threat of prosecution persisted and that freedom from restraint was but one of the interests at stake, this Court unanimously reversed.[21]

Judge Butzner, speaking for the court below on the first appeal of the case at bar, drew this telling comparison between Klopfer's case and Dr. MacDonald's (Op.App.15A):

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[21]Justice Harlan, concurring in the result, was of the view that the speedy trial provision of the Sixth Amendment was not applicable as such to the states. He stated that it violated the "fundamental fairness assured by the Due Process Clause" to "put a person under the cloud of an unliquidated criminal charge for an indeterminate period." 386 U.S. at 227.

After formal arrest and charge, both men contested their accusations with the inconclusive result of Klopfer's mistrial and the dismissal of the charges against MacDonald after the Article 32 proceedings. The prosecution against both men, however, could have gone forward promptly — Klopfer's by retrial and MacDonald's by court-martial if the commanding general had rejected Colonel Rock's Article 32 report or if the United States Attorney had presented the case to a grand jury. Nevertheless, neither man was held for trial. Consequently, Klopfer and MacDonald were free from imprisonment or the restraints of bail, but at all times they were subject to prosecution. Unlike defendants held pending trial, Klopfer and MacDonald were deprived of any forum in which to vindicate themselves. Most importantly, under the theory advanced by the state in *Klopfer* and by the federal government here, neither man would be safeguarded by the sixth amendment until the government, at its leisure, renewed the prosecution.

C. The government argues further that the ruling below will have an adverse impact on the administration of the criminal justice system. It states, quite correctly, that there may be various legitimate reasons for dismissing filed charges. The government may conclude that, though there was probable cause to arrest or indict, the evidence appears insufficient to prove guilt beyond a reasonable doubt. Or there may be a change of circumstances—new evidence may have come to light or a witness may become unavailable. Again, a defect in the indictment may lead the court to grant a motion to dismiss. In such situations, the argument runs, the government should be free to make a considered reassessment of its position, and not be required to proceed in a hurried atmosphere (Br., p.16).

The short answer is that nothing in the ruling below inhibits legitimate prosecutorial objectives. The court of appeals had no doubt that the Department of

Justice acted within its prerogatives in deciding to re-examine the MacDonald case after the United States Army had fully examined it and decided to dismiss the charges. It also accepted as reasonable the time consumed by reinvestigation, although that took eleven months. It did not fault the government's investigative agencies for taking an additional leisurely six months to submit a report of their findings. It said only that the government was guilty of inexcusable and irresponsible delay when, after all of that, the Department let the matter lie on the shelf for more than two additional years before deciding to present it to the grand jury. The government's plaint simply has no application to the approach taken by the court of appeals or to the ruling that it made.

Moreover, the "societal interest in providing a speedy trial" (*Barker v. Wingo*, 407 U.S. 514, 519 (1972)), as well as the "separate . . . interest of the accused" (*id.*), runs counter to the government's argument that unreasonable delay between the dismissal of an indictment and a subsequent reindictment should be ignored for Sixth Amendment purposes. Unnecessary delay between the institution of charges and their ultimate disposition, as this Court emphasized in *Barker* (at 519 *et seq.*), cannot fail to produce detrimental effects upon the administration of justice and the correctional system.[22] From the standpoint of this societal interest, it is no answer that in an occasional instance an accused might succeed in showing actual prejudice to the conduct of his defense sufficient to invoke the Due Process Clause of the Fifth Amendment.

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[22]Delay may result in a disposition contrary to the public interest or unjust to the defendant. It contributes to court congestion. It diminishes deterrence and the likelihood of rehabilitation of those who are convicted. In the case of those under some form of pretrial restraint, there are added adverse consequences.

We have stressed the fact that the court of appeals' ruling gives more than ample leeway to the pursuit of legitimate prosecutorial objectives during an interval between dismissal of charges and a subsequent reindictment. To this it should be added that petitioner's position, which would treat irresponsible and oppressive delay as immaterial, provides "opportunity for abuse by the government," *United States v. Henry*, 615 F.2d 1223, 1233, n. 13 (9th Cir. 1980). "To fail to measure the speedy trial period from initial arrest would allow the government to circumvent the speedy trial requirement by successively dismissing and resinstituting a complaint or indictment for the same offense." *United States v. Avalos*, 541 F.2d 1100, 1108-09, n. 13 (5th Cir. 1976) (dismissal in order to engage in forum shopping, followed by reindictment).[23]

In a prosecution involving facts indistinguishable from those in *Avalos*, the District of Columbia circuit followed the same approach and concluded that the Sixth Amendment had been violated. *United States v. Lara*, 520 F.2d 460 (D.C.Cir. 1975).[24] The current position of other

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[23]In applying the speedy trial provision, the *Avalos* court carefully distinguished between delay having a "valid investigative or prosecutorial justification" and delay resulting from neglect or a purpose to secure a tactical advantage. 541 F.2d at 1114. The views adopted in *Avalos* were confirmed in United States v. Nixon, 634 F.2d 306 (5th Cir. 1981).

[24]The government's brief argues (p. 26) that its position is supported by United States v. Bishton, 463 F.2d 887 (D.C.Cir. 1972). As discussed in our brief in opposition (pp. 13–14), the opinion in *Bishton* looked to both Fifth and Sixth Amendment criteria in considering the issue of prejudice resulting from delay in reindictment. At all events, it is plain that the same court's later decision in *Lara* adopts the view urged here by respondent. Adverting specifically to the demands of the speedy trial guarantee (520 F.2d at 464), the court stated (p. 465): "Since we hold that the decision to dismiss . . . and begin the case anew . . . was dictated by tactics and not by necessity the government must be charged with these nine months of delay."

federal courts of appeal that have addressed the question supports the Fourth Circuit's view that in the dismissal-reindictment situation the period of delay is measurable from the date of arrest or inital indictment, excepting, of course, those periods in which the delay is not attributable to governmental fault. *See, United States v. Roberts*, 548 F.2d 665 (6th Cir. 1977), *cert. denied*, 431 U.S. 931 (1977);[25] *Jones v. Morris*, 590 F.2d 684 (7th Cir. 1979), *cert. denied*, 440 U.S. 965 (1979); *United States v. Henry*, 615 F.2d 1223 (9th Cir. 1980) (dictum); *United States v. Huffman*, 595 F.2d 551 (10th Cir. 1979), citing *United States v. Merrick*, 464 F.2d 1087 (10th Cir. 1972), *cert. denied*, 409 U.S. 1023 (1972).[26]

Recent state decisions, taking note of *Marion*'s holding that arrest triggers the speedy trial guarantee, have also ruled that when an arrest and charge are followed by a dismissal and a reinstitution of the charge, "the time between indictments . . . is a delay properly

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[25]Contrary to the government's suggestion (Br., p.25, n. 19), the decision in *Roberts* plainly departed from the view earlier taken by the Sixth Circuit in United States v. Martin, 543 F.2d 577 (6th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977). *Roberts* held (p. 667) that the "right to a speedy trial under the Sixth Amendment" accrued on the date of the defendant's arrest, and that the twenty-six month delay from arrest to trial required examination of that constitutional issue. As the opinion makes plain (*id.*), twenty-one of the twenty-six months of delay took place between dismissal of the original charges and the defendants' reindictment on those charges.

[26]The government's survey of decisions of the courts of appeals overlooks the relevant decisions of the Seventh and Tenth circuits cited in the text. As our discussion indicates, seven circuits (the 4th, 5th, 6th, 7th, 9th, 10th and District of Columbia circuits) — not two, as suggested in the government's brief (p. 27) — currently support the position urged here by respondent. The government's position is supported by the reasoning of the Second Circuit's decision in United States v. Hillegas, 578 F.2d 453 (2d Cir. 1978), although the court did not actually decide any constitutional issue in that case.

chargeable to the government" and calls for a determination whether the prosecution "has justified" it. *Branch v. United States*, 372 A.2d 998, 1001 (D.C. App. 1977).[27] *State v. Black*, 587 S.W.2d 865, 874 (Mo.App.1979), observes that failure to include "the period between a dismissal and a second arrest" would allow the government "to circumvent the speedy trial requirement" and that during such period the defendant "may still suffer from the harms" inflicted by public accusation. The opinion continues (p. 875):

> Using the initial arrest as the inception of the prosecutorial process and the trial as the culmination of that process, makes the entire delay the possible 'triggering mechanism', and, if further inquiry is triggered, the court necessarily will determine, under the other *Barker* factors, whether the dismissal which occurred during this period was justified or not, whether the period between dismissal and the second arrest should be weighed against the state, whether defendant suffered prejudice from the total period of time he stood accused, etc. Thus, the Court is enabled to make a rational evaluation of all relevant facts which may affect a defendant's right to a speedy trial.

Other state court decisions have recognized that failure to take account of the period between indictments

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[27]Earlier state court decisions involving application of state constitutional and statutory speedy trial requirements to situations involving reindictment took a variety of directions. An annotation (Speedy Trial - Reindictment) in 30 ALR 2d 462 (1953) points out (p. 466 *et seq.*) that some decisions take the view that reindictment after dismissal starts a new period while others hold that the state may not extend the period by dismissal and reindictment (p. 471 *et seq.*). Although no clear-cut pattern emerges, it appears that the latter view is more frequently adopted when the dismissal was not at the instance of the defendant.

would enable prosecutors to defeat the objectives served by specific state law limitations on the time for bringing an outstanding indictment to trial. *See, e.g., Thigpen v. State,* 350 So.2d 1078 (Fla.App. 1977); *State ex rel. Back v. Starke Circuit Court,* 390 N.E.2d 643 (Ind. 1979); *People v. Lee,* 44 Ill.2d 161, 254 N.E.2d 469 (1969); *People v. Wilson,* 8 N.Y.2d 391, 171 N.E.2d 310 (1960); *Commonwealth v. Whitaker,* 467 Pa. 436, 359 A.2d 174 (1976); *Smith v. State,* 168 Tenn. 265, 77 S.W.2d 450 (1935); *State v. Crawford,* 83 W.Va. 556, 98 S.E. 615 (1919).

The government's brief points out (p. 31) that the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*, does not impose time limitations governing periods between dismissal of charges and their reinstitution.[28] The same is true of speedy trial statutes in the several states. The reasons are obvious. A *nolle prosequi* or a dismissal may be entered for any number of legitimate reasons, and it is wholly impractical to set fixed time limitations during which reindictment would be permissible. Reindictment will often depend upon events that are unpredictable, such as the discovery of new evidence that would warrant reopening of the case. That is precisely what Congress recognized in the passage quoted by the government (*id.*) from the legislative history: "To require a prosecutor to conform to indictment and trial time limits which were set by the filing of the original complaint in order to reopen a case on the basis of new evidence would be an insurmountable burden" (S.Rep. No. 93-1021, 93d Cong., 2d Sess. 38 (1974)). But the impracticability of dealing with the matter by fixed time limitations makes it all the

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[28]It is common ground between the parties that the Act has no application to this litigation. *See* 18 U.S.C. § 3163 (effective date) and opinion of the court of appeals in *MacDonald I* (Op.App.14A, n.15). It is of course relevant to future administration of the criminal law.

more important — not less so — that defendants have the protection afforded by the constitutional guarantee. Congress was presumably aware of this when it provided in the Act (18 U.S.C. § 3173): "No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution."

The government further notes (Br., at 31) that the Speedy Trial Act, in dealing with the situation where a prosecutor dismisses and subsequently reindicts on the same charge, provides for tacking a period of delay between indictment and dismissal to any delay between reindictment and trial. This, it is suggested, will adequately guard against circumvention of speedy trial requirements. But plainly this is not so. The more stringent the application of fixed time limitations to delays between indictment and trial, the greater is the incentive to avoid those limitations — to toll the running of time — by dropping the charge and later reinstating it. A prosecutor who fears that he will run afoul of time limits down the road will be tempted to take a detour by the avenue of dismissal. There can be no objection if there is a plausible reason for the dismissal and if legitimate prosecutorial objectives are thereafter pursued. But the need for protection from unreasonable delays — a need that cannot feasibly be satisfied by fixed limitations — calls imperatively for application of the flexible requirements written into the Constitution and elaborated in *Barker v. Wingo, supra*. That theme runs repeatedly through the decisions noted above.

D. We accordingly submit that faithfulness to both the fundamental constitutional purpose to protect an accused person from protracted delay and to the corresponding societal interest in the fair and prompt adminstration of criminal justice requires affirmance of the holding below. The correctness of that holding is con-

firmed, moreover, by the reasoned decisions of both federal and state courts.

Assuming, as we do, that respondent was under the umbrella of the speedy trial guarantee during the period taken into account by the court of appeals, the conclusion that the Sixth Amendment was violated follows inexorably. The delay was substantial and it was inexcusable. It took place notwithstanding respondent's repeated demand for prompt resolution and his unfailing cooperation with the authorities.[29] The resulting prejudice is unmistakable. Each of these propositions, as appears from the Statement above (pp. 8–15), is the subject of specific and concurrent findings made by the two panels of the court of appeals that have considered the record.

## II.

## THE PREJUDICE TO THE CONDUCT OF THE DEFENSE CAUSED BY THE GOVERNMENT'S DELAY RESULTED IN A DENIAL OF DUE PROCESS

A. The court of appeals, having concluded that respondent's Sixth Amendment rights were violated, found it unnecessary to decide his alternative claim of a due process violation. Although the court refrained from drawing an ultimate legal conclusion on that aspect of the case, the claim of prejudice is illuminated by the record and the court's findings. Accordingly, the matter is ripe for disposition should this Court find occasion to go

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[29]The government makes the remarkable suggestion (Br., pp. 36–37) that Dr. MacDonald's repeated demands for a prompt resolution were not "meaningful", although it fails to explain what more he might have done. Obviously the argument adds nothing to the government's effort to read out of the coverage of the Sixth Amendment all cases involving a sequence of indictment, dismissal, and reindictment.

beyond the Sixth Amendment issue. "[T]he prevailing party may defend a judgment on any ground which the law and record permit that would not expand the relief it has been granted," *United States v. New York Tel. Co.*, 434 U.S. 159, 166, n.8 (1977).

Several considerations, we believe, support the view that the Court should exercise its discretion in favor of resolving the Fifth Amendment issue in the event it doubts the applicability of the Sixth. As noted, the ground is laid out by the record and findings. Secondly, the cause is already more than eleven years old. Thirdly, the government, apparently recognizing the force of these factors, has itself tendered the question.

Holding in *United States v. Marion, supra,* that the Sixth Amendment was inapplicable to the defendants in that case because the challenged delay occured before they were arrested or charged, this Court, in remanding the cause for trial, observed (404 U.S. at 326), "Events of the trial may demonstrate actual prejudice, but at the present time [defendants'] due process claims are speculative and premature." Subsequently, in *United States v. Lovasco,* 431 U.S. 783 (1977), the Court explained that such a defendant must show that the preindictment delay was unreasonable (a matter fully discussed under Point I), and that resulting prejudice to the conduct of his defense at the ensuing trial was sufficiently serious to violate "fundamental conceptions of justice" (p. 790).[30] We urge that this case meets that test.

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[30]Lovasco, the Court concluded, had failed on both counts. The delay, in the Court's view, was justified by additional investigation conducted by the government in an effort to identify other participants in the offense (431 U.S. at 796). Moreover, while Lovasco claimed prejudice resulting from the intervening death of two witnesses, he failed to state how those "witnesses would have aided the defense . . ." (*id.* at 786).

B. The government showed no motive for the crime charged to Dr. MacDonald and it had no witnesses to its occurrence. Its case rested entirely on the testimony of its investigators and technicians, through whom it attempted to piece together a theory constructed from items of physical evidence — the location of fibers from the pajama top respondent was wearing on the night of the murder; the way the pajama top was folded; the position of items of furniture; the conditions of sheets in the bedroom; the location of bloodstains. We recognize, of course, that it is not the function of this Court to evaluate the admissibility of the government's attempted demonstrations or the sufficiency of its evidence, issues raised but not reached in the court below. The court of appeals, however, did make specific findings as to the effect of the lapse of time upon the ability of the defense to deal with the prosecution's hypothetical reconstruction of the crime.

Thus it found that the technical witnesses relied largely on "scientific speculation and trial and error" (Pet. App.16a, n.7).[31] There was "almost certain memory erosion" on the part of all of these witnesses (Pet.App.14a). "The risk to MacDonald was simply too great that, in preparations *prior to the testifying* of each witness, the prosecutors helped fill lacunae of recollection" in order to assure "consistency of support for their theory of the case . . ." (Pet.App.10a; emphasis in original). The period of delay, the court concluded, "rendered it virtually im-

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[31]Dr. John I. Thornton, a University of California scientist who assisted the defense, stated (C.A.App., p.1867):

> [T]he protracted delay imposes severe constraints on the selection and execution of tests that may be applied to various aspects of the physical evidence in this case, and . . . the physical evidence is not capable in all regards of being utilized by the defense.

possible" for the defense to probe effectively their recollections (*id*).[32]

A finding that the defense was disabled from testing effectively the basis of the government's hypothesis is surely tantamount to a determination that respondent was severely prejudiced — especially so, where the prosecution's attempted reconstruction was the whole of its case.

C. No less important is the impact of delay upon the ability of the defense to develop its affirmative case. We refer particularly to the availability of testimony from Helena Stoeckley. When the military police arrived at the MacDonald apartment on February 17, 1970, Dr. MacDonald gave them a description of the female intruder he said had been present (blond hair, white floppy hat, boots). He also described one of the three male intruders as a black man wearing an army-type jacket with sergeant stripes. This account was sufficiently descriptive to alert a Fayetteville officer who was cooperating with the military authorities to the likelihood that Stoeckley, whom the officer knew as a drug informant, might be the woman in question. She characteristically wore a blond wig, boots and a white floppy hat, and she associated with a black male who invariably wore a military jacket with

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[32]Some examples of this are found in the testimony of Pamela Cochran and Dr. Severt Jacobson. Cochran had been a babysitter for the MacDonald children. In 1970 she told investigators that she had never seen an ice pick (one of the presumed murder weapons) in the MacDonald home. In 1979 she testified that there was an ice pick in the home (Tr. 3567-3572).

In 1970, Dr. Jacobson, one of the attending physicians, testified he did not believe that the stab wound in Dr. MacDonald's lung was self-inflicted. But, at the trial in 1979 he testified that it may have been self-inflicted (Tr. 2869-2870; 2877-2880).

E-6 stripes.[33] The officer, one Beasley, promptly confronted Stoeckley, who made the hedged admission,[34] "In my mind, it seems that I saw this thing [the murders at Fort Bragg] happen," adding, "I was heavy on mescaline" (J.A. 149).[35] Subsequently, Stoeckley was to make admissions against penal interest to six other persons, all of whom were prepared to testify to the same before the jury, but none of whom was permitted to do so.

Helena Stoeckley was the daughter of an Army officer stationed at Fort Bragg. After graduation from high school at an early age, she left home and moved into the Haymont section of Fayetteville[36] where she remained for the next several years (Tr. 5516, 5519-20).[37] She was soon heavily involved in the use of drugs (Tr. 5522 *et seq.*) and became known as a member of a "hippie" group (Tr. 5987). She also dabbled in witchcraft (Tr. 5542 *et seq.*)[38] and served as a secret drug informant for the police (J.A. 63-64, 148).

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[33]A non-comissioned E-6, like a line sergeant, wears a patch with three chevrons.

[34]Like the other Stoeckley admissions that we shall note, this was not heard by the jury but came into the record on *voir dire*. *See* pp. 38–43 *infra*.

[35]Detective Beasley also testified that Stoeckley was "the most reliable informant I ever had" (J.A. 148).

[36]She described Haymont as a "miniature version of Greenwich village" (Tr. 5520). It was frequented by soldiers, some of them absent without leave and hiding from the authorities (Tr. 5522).

[37]Stoeckley left Fayetteville in 1970, subsequent to the murder of Mrs. MacDonald and the MacDonald children, and moved to Nashville, Tennessee.

[38]One of the exercises in which she engaged involved the killing of a cat for sacrifice (Tr. 5544, 6001).

More admissions followed those made to Beasley. We summarize these extrajudicial declarations in their chronological order.[39]

Several days after the murders, Helena Stoeckley told her neighbor, William Posey, that she held the light during the commission of the crimes,[40] but that she would not kill anybody herself (J.A. 160). She also said that she remembered being seen by a policeman at the intersection near the MacDonald home shortly after the crime (*id.*).[41] She further commented on a "hobby horse thing" in one of the children's rooms, saying that it was broken and wouldn't roll (*id.*).[42]

During the months following her removal to Nashville in late 1970, Stoeckley discussed her involvement with four persons in that city (witnesses Zillioux, Underhill, Gaddis and Brisentine).

She told Jane Zillioux, a woman who had befriended her, that she could not return to Fayetteville because she was involved in murders there (J.A. 124).[43]

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[39]We note here the gist of critical admissions. The full testimony on *voir dire* appears at J.A. 121–169 and Tr. 5928 *et seq.* We discuss below (pp. 39–43) the trial judge's ruling excluding this testimony from the trial proper.

[40]Dr. MacDonald had testified that there was a flickering light on the face of the female intruder as if she were holding a candle (Tr. 6592).

[41]According to Posey (*id.*), Stoeckley named the street (Honeycutt) where she believed she had been seen. It was the same street where Sergeant Mica had made his observation of the woman in a floppy hat. See Statement, *supra*, p. 5, n.3.

[42]There was a hobby horse in the MacDonald apartment. *See* J.A. 89–91, 160.

[43]Describing the murder scene, she stated to Zillioux, "So much blood. I couldn't see or think of anything except blood . . . I asked the boys to take me home. I had to get home" (J.A. 126).

She said she had been with three males at the time (J.A. 125). She also asked Zillioux not to repeat what had been said (*id.*).[44]

Another Nashville friend, Charles Underhill, testified Stoeckley told him, while she was in a state of emotional distress, "they killed her and the two children . . . they killed the two children and her" (J.A. 135).

Stoeckley confided to James Gaddis, a Nashville police officer with whom she became acquainted and to whom she gave information concerning drug traffic, that she had witnessed the MacDonald murders and knew who had committed them (J.A. 133).[45]

CID investigator Brisentine interviewed Stoeckley in Nashville in April, 1971. She told him that she thought she had been present during the MacDonald murders but that she had not actively participated in the homicides (J.A. 138). She remarked that it had not started to rain hard until after the murders. Pressed on this point, she replied, "I have already said too much" (J.A. 141). At one stage of the interview, she offered to reveal names of the participants and the circumstances surrounding the killings if granted immunity from prosecution (J.A. 140). Brisentine also recalled that "she knew about the blood on the bed" (J.A. 144).[46]

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[44]In other remarks to Zillioux, Stoeckley stated that it was raining heavily on the night of the murders; that she was afraid her wig would be ruined; and that she had had to get rid of the wig and white boots she had been wearing, although she loved them (J.A. 124, 127).

[45]Stoeckley also stated that one of the men who was involved had a blue Ford Mustang (J.A. 132). Stoeckley had been seen by William Posey returning to her home in a blue Mustang at 4:30 a.m. on February 17, 1970. Statement, *supra*, p. 5, n.3.

[46]Stoeckley also volunteered to Brisentine the information that "the hippie element was angry with Dr. MacDonald as he would not treat them by prescribing methadone for their addiction to drugs" (J.A. 138).

During the trial Stoeckley was visited by Wendy Rouder, one of defendant's trial counsel, in the wake of a report that Stoeckley had been assaulted (Tr. 5929).[47] In the course of the ensuing conversation Stoeckley acknowledged that she had "a memory" of "standing at the couch [in the MacDonald home] holding a candle . . ." (Tr. 5937).[48] Responding to a question from Rouder as to whether she had ever lost her sense of guilt concerning the MacDonald murders, she replied, "No, what do you think I have taken all these damn drugs for?" (Tr. 5934).

It is true that Stoeckley's admission were fragmentary and that she would characteristically back away from them when pressed, at times denying recollection, on other occasions stating that she had already said too much. They are nonetheless telling. As the preceding summary demonstrates, they tally at numerous critical points with the trial testimomy of Dr. MacDonald and other witnesses, and with established facts and circumstances regarding the crime.

We have explored details of Stoeckley's admissions at some length in order to put flesh on the court of appeals' findings of prejudice and to provide a fuller sense of just how important it was to the defense that the jury hear Stoeckley's words. We emphasize, however, that the findings themselves provide ample basis for the legal conclusion that we urge this Court to draw. As set forth in the Statement, the court below found that the failure of Stoeckley to verify Dr. MacDonald's account from the

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[47]Stoeckley stated to Rouder that she was frightened and would like someone to stay with her (Tr. 5931).

[48]As already noted (Statement, p. 3 and page 35, n.40), Dr. MacDonald testified that he first saw the intruders in his home standing at the couch, and that there was flickering light on the face of the woman.

witness stand "may well have been disastrous to the defense." Had she testified "as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great." The "reason she asserted under oath was failure of memory. The government's inexcusable delay . . . cannot be eliminated as a potential — indeed a probable — cause of that memory lapse."

To be sure, as the court below stated, there were other "possible reasons." A plausible alternative explanation is that, although there may have been some failure of memory, Stoeckley's claim on the witness stand that she had no recall of the events of the critical hours was feigned. To adopt that assumption, however, would not alter the result. There is no basis upon which it can fairly be concluded that Stoeckley would have had the temerity to deny recollection of her whereabouts and of her own prior statements had the trial been promptly held. The government, bearing the responsibility for what has been found to be inexcusable delay, cannot shift to the defendant the burden of establishing with certainty what would have occurred had the government acted permissibly. Just as a defendant cannot be expected to show precisely how much a witness may have forgotten as the result of a lapse of time, *Barker v. Wingo*, 407 U.S. 514, 532 (1972), he cannot be expected to prove how fully a witness would have responded to his or her testimonial obligations if called upon years earlier.

D. The prejudice resulting from the defense's inability, at trial, to elicit from Helena Stoeckley an account of her conduct during the critical hours of February 17, 1970, would have been allayed, if not cured, had the jury heard her out-of-court admissions against penal interest. That, however, was vigorously and successfully resisted by the prosecution. We submit that the trial court's ruling excluding those admissions was contrary to both the Fed-

eral Rules of Evidence[49] and the demands of the Constitution.[50] The government, in short, succeeded in compounding, rather than relieving the prejudice it had created.

There can be no question, of course, that Stoeckley's admissions were against penal interest; they directly implicated her in the murders with which Dr. MacDonald was charged.

The ground on which the trial court excluded them was that there was insufficient indication of their trustworthiness because Stoeckley frequently equivocated and because she was a person addicted to drugs (C.A.App.

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[49]Rule 804 reads in pertinent part:

> (b) *Hearsay exceptions.* — The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> * * *
>
> (3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Subsection (a) of the Rule provides that unavailability as a witness includes situations in which the declarant "testifies to a lack of memory of the subject matter of his statement."

[50]"Few rights are more fundamental than that of an accused to present witnesses in his own defense," Chambers v. Mississippi, 410 U.S.284, 302 (1973).

1589-91).[51] However, wariness in making a damaging admission would seem natural, rather than suggestive of falsity.[52] Nor does the fact that Stoeckley freely used drugs mean that her admissions were unworthy of belief.[53] Apart from the consideration that there may be truth in drugs as well as in wine, it appears that many of the statements were made when she was not under the influence. The basic flaw in the trial court's position, however, is that, although it purported to rely on the final sentence of Rule 804(b)(3) ("A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement"), neither of the reasons it gave in any way indicates a lack of corroborating circumstances. The Rule does not require that a declarant who has admitted criminal activity be a person of good habits and character or generally reliable; it asks whether corroborating circumstances support the conclusion that a particular statement against interest is likely to be true. *See,* 4 *Weinstein's Evidence,* 804-103 *et seq.* (1979).

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[51]The court of appeals found it unnecessary to make a definitive ruling on the exclusion of the Stoeckley admissions. Nonetheless, it made rather clear its disagreement with the district judge. Referring to the defendant's efforts "to supply the deficiency of Stoeckley's memory" by introducing her admissions, it commented that "the government may rue having prevented curative action" (Pet.App.12a-13a, n.6).

[52]The testimony of those who talked to Stoeckley persuasively suggests that she was torn between a sense of guilt, which periodically impelled disclosures, and a recognition of the dangers of going too far in the direction of self-incrimination. *See, e.g.,* Tr. 5934, 5936.

[53]The record indicates that Stoeckley was using drugs on one of the two days she was interviewed by CID agent Brisentine (J.A. 142). There is no evidence that she was on drugs on other occasions when she made admissions.

It should be noted that Helena Stoeckley had no apparent motive, other than her own sense of guilt, to implicate herself in the MacDonald murders. This is not the troublesome case in which a statement may be suspect because the declarant is a friend or associate of the defendant and disposed to aid him by sowing doubts as to his guilt. Dr. MacDonald and Helena Stoeckley had never laid eyes upon one another prior to February 17, 1970. This is a case, moreover, in which admissions were made promptly after the event and then repeated over the course of years. They were made to friends and acquaintances as well as to law officers. Some were spontaneous. In no instance was there any suggestion of coercion.

Finally, and most importantly, there is a remarkable degree of corroboration for Stoeckley's admissions. Dr. MacDonald gave a description of the woman who was one of the four intruders. That description was adequate to lead a local police officer directly to Stoeckley. Then and there Stoeckley implicated herself. The doctor also described the jacket worn by the black male intruder. Stoeckley associated with a black male who regularly wore such a garment. Dr. MacDonald said that when he first saw the woman, she was standing beside his living room couch and a light was flickering on her face. Stoeckley, in her admissions, spoke of standing at the couch and referred more than once to holding a light or candle for her companions. Stoeckley was away from her apartment during the critical hours between midnight and 4:30 or 5:00 a.m. No witness has ever come forward to provide an innocent explanation of her behavior during that period, although she was seen returning to her home at about 4:30 a.m. in the company of several persons. About a half hour earlier, a woman answering Stoeckley's description had been seen by a military policeman at an intersection in the vicinity of the MacDonald home. Stoeckley later commented to her neighbor that she had

been observed at one of the intersecting streets named by the M.P. On one occasion when Stoeckley said that she knew the identity of the participants in the crime, she stated that one of them owned a blue Mustang. The neighbor who had observed her return to her apartment at about 4:30 a.m. said that she arrived in a blue Mustang. Stoeckley made reference to a "hobby horse thing" in the MacDonald home that wouldn't roll. There was a broken hobby horse in one of the MacDonald children's rooms.

The above may be contrasted with Judge Weinstein's authoritative statement of the requirements of corroboration under Rule 804(b)(3) (4 *Weinstein's Evidence*, 804-104, 804-105 (1979)):[54]

> The court should only ask for sufficient corroboration to "clearly" permit a reasonable man to believe that the statement might have been made in good faith and that it could be true. If, for example, the proof is undisputed that the person confessing to a shooting could not have been at the scene of the crime because he was in prison, it will be excluded. But if there is evidence that he was near the scene and had some motive or background connecting him with the crime that should suffice.

Obviously, the corroboration here is immeasurably more compelling.

While it is unnecessary to go beyond the Rule to demonstrate the egregious error of the trial court's ruling, it may be added that, in the absence of the Rule, the Constitution itself would condemn the denial of the defendant's opportunity to call the witnesses to the Stoeck-

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[54]Judge Weinstein, it may be noted, was a member of the Advisory Committee on the Rules of Evidence.

ley declarations. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), a person other than the defendant had made out-of-court admissions, and the state court refused the defendant leave to call the witnesses who had heard them. Reversing the conviction on due process grounds, this Court emphasized (at 300-301), first, that the admissions had been made spontaneously to a close acquaintance; second, that each admission was corroborated by some other evidence in the case and that the sheer number of independent statements provided additional corroboration for each; third, that the declarant had stood to gain nothing by disclosing his role; and, finally, that the declarant was available to the state for cross-examination. Each of these factors has its counterpart here.

In summary, the prejudice resulting from the government's delay and the unavailability of Helena Stoeckley was compounded, at the government's instance, by the failure of the trial court to permit curative action of the kind demanded by the Rules of Evidence and by the Constitution. The conclusion that Dr. MacDonald was denied the fundamentals of a fair trial is inescapable.[55]

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[55]Throughout this brief we have addressed the constitutional arguments tendered by petitioner. Of course, the thrust of respondent's arguments would also warrant affirmance of the judgment reversing the conviction by exercise of this Court's supervisory powers over the lower federal courts. McNabb v. United States, 318 U.S. 332, 340 (1943). ("[T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.")

## *CONCLUSION*

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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